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Sir Thomas Hay, of Alderſton, Bart. and his Majeſty's Advocate for Scotland, - - - } Appellants.

Mr. Thomas Hay, of Mordington, - - - Reſpondent.

The Reſpondent's CASE.

4th Dec. 1705. SIR *John Hay* of *Alderſton*, the Appellant's Father, and Brother of the Reſpondent, by Deed of this Date, did nominate and appoint Dame *Catherine* his Wife, Mr. *Alexander Hay*, and the Reſpondent, his Two Brothers, to be Tutors and Curators (or Guardians) to his Children, "with a Power to them to appoint Factors, with "Salaries, and to do every thing elſe that belonged to the Office:" And it was declared by the Deed, "That "the Tutors and Curators ſhould not be liable for any Omiſſions that might be alleged or pretended againſt them by his "Children, or any of them, during their Office; and that they ſhould not be obliged to do any further Diligence, than "they themſelves ſhould think fit and expedient:" And Sir *John Hay* recommends to them, to adviſe on all proper Occaſions with his Lady's Father Sir *George Suttie*.

6th Sept. 1706. Sir *John Hay* died, leaving the Appellant his eldeſt Son, about Eight Years of Age, and Five other Children: The Tutors entered upon the Adminiſtration, and made up and recorded the tutorial Inventories, as the Law of *Scotland* directs; but in order to ſave the Expence of Salaries to Receivers or Factors, the Appellant's Mother undertook the Management of the Eſtate, and Receipt of the Rents; in which ſhe was aſſiſted by Mr. *Alexander Hay* and the Reſpondent, who from time to time ſettled Accounts with her; and during Sir *Thomas*'s Minority, the annual Income of all the Appellant's Eſtate did not much exceed Sixty Pounds Sterling, after Payment of the Appellant's Mother's Jointure, the Maintenance of the Children, and Intereſt of Debts due by Sir *John* at his Death; ſo that the Reſpondent was obliged to advance ſeveral Sums to the Appellant, from 1712. to 1718. for ſupporting the neceſſary Charge of his Education, which for the laſt Five Years of his Minority amounted to a great deal more than the free Rent of his Eſtate.

1718. In the Year 1718. the Appellant deſiring to go into the Army, his Curators purchaſed a Comedy of Dragoons for him, and gave their Bond for 600 *l.* the Price thereof; which Bond, Principal and Intereſt, was afterwards paid and diſcharged by the Reſpondent, in the Year 1723. Beſides the Price of the Comedy, the Reſpondent further advanced a large Sum for ſupplying the Appellant with Horſes, Equipage, and other Neceſſaries.

1719. The Appellant, having attained his Age of Twenty-one Years, in *September* 1719. and being well ſatisfied with the Care and Management of his Tutors, came to a final Settlement with them, and gave them a full and ample Diſcharge
25th Nov. 1719. of this Date, reciting, "That they had made juſt Compt, Reckoning, and Payment, for their Intromiſſions, wherewith "he was ſatisfied and content: That they had delivered up his Writs and Evidents, and whatever elſe belonged to "him, which was in their Cuſtody or Poſſeſſion; and therefore he then, after attaining his Age of Twenty-one Years "complete, exonerated, quit-claimed, and diſcharged, his Tutors and Curators of their Intromiſſions, and of all Omiſ"ſions whatſoever, that might be laid to their Charge, relating to the ſaid Office of Tutory and Curatory, and of the "haill Bonds, Obligations, Aſſignations, Tranſlations, Charters, and Inſeftments, and other Writs, Rights, and Securi"ties, of his ſaid Eſtate, and of all Action competent to him againſt them, or any of them, which might any-wiſe ariſe "upon the ſaid Tutory or Curatory; and alſo ratified and approved all Diſcharges and Conveyances made and granted "by his ſaid Tutors, during their Adminiſtration, to any Perſon whatſoever, diſpenſing with the Generality of the Diſ"charge, and admitting the ſame to be as valid as if every Particular was ſpecially expreſſed."—This Diſcharge was regiſtred in the Books of Council and Seſſion, the Day after it was dated.

June 1720. The Appellant went to *France* ſoon after obtaining his Commiſſion, and the Reſpondent gave him Credit Abroad, and paid the Appellant's Bills, to the Amount of 550 *l.* which Bills have been alſo produced; and the Appellant was ſo ſenſible
28th Dec. 1720. of the Reſpondent's Affection and Indulgence to him, that in a Letter from *France*, dated 28th *Decem.* 1720. he writes the Reſpondent, amongſt other things, thus,—"I believe I ſhall be a Beggar; I do not know how I ſhall look you in "the Face, after what Money I have ſpent."

1721. The Appellant returned in the Spring 1721. indebted to the Reſpondent in a large Sum, beſides the conſiderable Advances before-mentioned; for none of which the Reſpondent had received any Reimburſement. The Sum of 1585 *l.* Sterling had been indeed received out of the late Earl of *Winton*'s forfeited Eſtate, about the End of the Year 1720. (being a Debt due thereout to Sir *John Hay* the Appellant's Father); but that Sum was paid to the Appellant's Mother, by virtue of a Factory (or Letter of Attorney) from the Appellant.

1722. The Appellant went a Second time into *France*, and prevailed on the Reſpondent to aſſiſt him again with his Credit. He continued in *France* from the latter End of the Year 1722. till the Spring 1724. and in that time drew Bills on the Reſpondent to the Amount of 800 *l.* Sterling: But theſe were not the only Sums advanced by the Reſpondent: There were ſeveral other Sums paid, for which he either had no Vouchers, or, if he had, at this Diſtance of time, above Twenty Years, it is impoſſible for the Reſpondent to find them.

Feb. 1723. The Reſpondent purchaſed for the Appellant an old Appriſing on the Eſtate of *Alderſton*, which was in the Name of *Gray*, for the Conſideration of 1000 *l. Scots* (or 83 *l.* 6 *s.* 8 *d.* Sterling).

1724. The Appellant married ſoon after his Return to *Scotland*; and in the Spring 1724. as well upon Account of his Marriage, as of the Funeral of his Lady (who died the Year after Marriage), applied again to his Uncle the Reſpondent for further Credit, and obtained it, as appears by ſeveral Vouchers produced.

1725. The Appellant took a Third Journey to *France*, where he ſtayed Four or Five Months; during which time he was again ſupported by the Reſpondent, upon whom he drew Bills to the Value of 300 *l.* Sterling, which are produced; and many other Sums were paid on his Account, the Vouchers whereof are not now in the Reſpondent's Power.

The Reſpondent, having, by theſe large Advances to the Appellant, reduced himſelf, thought it neceſſary to come to ſome Settlement with him; but being unwilling to ſeem hard upon the Appellant, for whom he had ever ſhewn great Affection, he took the Meaſure of his Demand from what his own Circumſtances required, and not from what he had really paid, and had an undoubted Right to recover from the Appellant; and therefore, after informing the Appellant of the State of the Account between them, he declared his Willingneſs to accept of the Appellant's Bond for 1800 *l.* Sterling, in full of all that was due to him, though the Balance far exceeded that Sum; which the Appellant, ſenſible of the Reſpondent's Kindneſs and Generoſity, readily agreed to.

The Reſpondent, from an affectionate Regard for the Appellant, would not, in caſe of his own Death, even leave it in the Power of his Heirs, or Executors, to diſtreſs him for this Money; and therefore ordered the Bond to be made payable to himſelf and his Aſſigns only; which, when drawn, was by Capt. *Wilkinſon* (a common Friend to both Appellant and Reſpondent) carried from *Edinburgh* to the Appellant's Houſe at *Alderſton*, and there executed by him in the Preſence of Capt. *Wilkinſon*, and the Appellant's own Brother *George Hay* (now Colonel *Macdowgal*), upon the 31ſt
8 Dec. 1726. Day of *December* 1726. And thereby the Appellant "grants himſelf to be juſtly indebted, reſting, and owing to Mr.
e Appellant's "*Hay* the Reſpondent, the Sum of 1800 *l.* Sterling; which with the annual Rents (or Intereſt) from the Date to the
nd. "Term of Payment therein mentioned, he binds and obliges himſelf, his Heirs, Executors, and Succeſſors, to pay to "the Reſpondent, or his Aſſignees (ſecluding his Heirs and Executors); and that betwixt and the Term of *Martinmas* there-

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" thereafter, with 300 *l.* Money foreſaid, of Penalty in the Bond, and Intereſt of the ſame (or Intereſt), of the ſaid principal Sum, during the Non-payment thereof after the aforeſaid Term; and in caſe the Reſpondent ſhould not call for the ſaid Sum in ſtanding Life-rent, or what Part thereof ſhould remain unpaid at the time of his Death, the ſame ſhould not be payable to the Reſpondent's Heirs or Executors, but ſhould belong to the Appellant.

1738. The Appellant for Twelve Years, having neither paid the Intereſt, nor any Part of the Principal, the Reſpondent, about the End of the Year 1738. acquainted him, that although he had not hitherto done him Juſtice, with reſpect to his Bond, yet that he was to lay his Account, with being called upon for Payment thereof, either to the Reſpondent himſelf,

1741. or to ſuch Perſons as he ſhould aſſign it to. And the Reſpondent made no further Demand, till he ſhould diſtreſs the Appellant, till 1741. when he applied for Payment, at leaſt ſome Part of the Sum. The Appellant thereupon made one Payment of 1000 *l. Scots* (or 83 *l.* 6 *s.* 8 *d.* Sterling), and took the Reſpondent's Receipt for it, in Part of what was due: And afterwards, in the Year 1745. made Two more Payments; the firſt of 200 *l.* and the other of 100 *l.* Sterling, which is all that has ever been paid. And the Appellant, in many Letters to the Reſpondent, from the Year 1741. (produced in this Cauſe) not only acknowledges the Debt, but expreſſes great Deſire of paying it, with many Acknowlegements to the Reſpondent, for his long Forbearance.

March 1748. The Reſpondent, in the Month of *March* 1748. finding no Effect from theſe repeated Promiſes and Aſſurances of Payment, applied to the Appellant, offering, that he would, at leaſt, do him the Juſtice of giving a Bond of Corroboration, as a Security for the Principal and Intereſt, which then amounted to about 1200 *l.* Sterling; and at the ſame time acquainted the Appellant, that he did not intend to diſtreſs him, but ſhould be ſatisfied to take, from time to time, what the Appellant could conveniently afford; and notified to him, that he muſt lay his Account, with paying the full Money due on the Bond, after the Reſpondent's Death. The Appellant not only refuſed to comply with this reaſonable Requeſt, but immediately before the Bond was put in Suit, or any Proceſs taken out upon it, applied to the Lords of Seſſion for a Suſpenſion of the Debt, which he obtained upon ſpecial Bail; and at the ſame time, the Appellant alſo brought an Action of Compt, Reckoning, and Payment, againſt the Reſpondent, and the Repreſentatives of his other Tutors and Curators, claiming, amongſt other large Sums libelled at random, the Sum of 5000 *l.* Sterling, and Intereſt, for Intromiſſions had by the Reſpondent, and others, with the Appellant's Eſtate, unaccounted for. But this Proceſs of Compt and Reckoning was preſently diſmiſſed, on Production of Writings under the Appellant's own Hand, directly contradicting the Aſſertions of his Libel.

The Appellant, being diſappointed in his Action of Compt and Reckoning, inſiſted in the Suſpenſion; and at the ſame time brought an Action of Reduction for ſetting aſide the Bond. Theſe Cauſes of Suſpenſion and Reduction coming in Courſe before the Lord *Eaſdale* Ordinary, his Lordſhip ordered, that both Actions ſhould be conjoined, and heard together.

And at next Calling of the ſaid Actions before the Lord Ordinary, Parties appearing by their Counſel, it was inſiſted for the Appellant,

1ſt Reaſon of Suſpenſion. Firſt, That the Bond was not granted for borrowed Money, but for a random Sum, upon Aſſurances from the Reſpondent, that the Appellant ſhould get his Eſtate at his Death: That the Reſpondent could not compel the Appellant to pay the Money; and thereby deprive him of the Chance of its belonging to him, at the Reſpondent's Death; or at leaſt that the Reſpondent could demand ſo much only as he ſhould prove was really due to him at the time of executing the Bond.

2d Reaſon. That the Reſpondent being ſole Manager of the Appellant's Eſtate and Affairs, during his Minority, he was, as ſuch, liable to account with the Appellant for his Conduct.

3d Reaſon. That though the Appellant had truly owed the Sum in the ſaid Bond, at the Date thereof, the ſame would in great Part be now ſatisfied and paid by ſeveral Sums of Money and Effects of his, which had been received or taken by the Reſpondent, but whereof the Appellant, ſtill continuing to repoſe the ſame Truſt and Confidence in the Reſpondent, did not take care to preſerve proper written Documents, nor could he now condeſcend on them all.

It was anſwered for the Reſpondent,

1ſt, That, as the Bond was given for a liquidated Sum, which the Appellant acknowleged he owed the Reſpondent for large Advances made to him at ſeveral times, it was the ſame as if given for Money then actually borrowed.

2d, As to the Reſpondent's Management of the Appellant's Affairs, during his Minority, the Appellant's Mother had the chief Management of the Eſtate; and what ſmall Intromiſſions the Reſpondent had, were for anſwering particular Demands; and Accompts were always ſettled, for ſuch Intromiſſions, between the Appellant's Mother, and the Reſpondent: That, from the Settlement between the Appellant, and his Guardians, 25th *November* 1719. it appeared, that the Appellant had himſelf received 2000 *l. Scots*, or 166 *l.* 13 *s.* 4 *d.* Sterling, of the Rents of his Eſtate in 1717. and the whole Rent in 1718. before he came of Age: And as to the Management after he came of Age, the Appellant himſelf produced a Factory, or Power of Attorney, granted by him to his Mother in the Year 1720. And if the Reſpondent did, with the Allowance of the Appellant's Mother, receive any Part of the Rents from the Appellant's Tenants, theſe, and every other Payment received out of the Appellant's Eſtate, were fairly ſtated, and diſcounted to him, when the Bond in Queſtion was granted: That the Reaſons offered, why the Reſpondent ſhould ſet forth the particular Items, which made the Conſideration of the Bond, at this great Diſtance of time, 23 Years from the Date, were not ſufficient, even in an Action of Reduction: The Conſequence of laying open all Bonds, or other Securities of that Nature, at the Caprice of a Debtor, were very dangerous: And the Reſpondent abſolutely denied, that the Bond was given without a previous Account, upon which there appeared to be more due to him, than the Sum for which it was given.

3dly, That, ſince the Date of the Bond in Queſtion, the Reſpondent and Appellant had little or no Dealings together; and, except Three Payments in Part, *viz.* 1000 *l. Scots*, or 83 *l.* 6 *s.* 8 *d.* Sterling, in the Year 1741. 500 *l.* and 100 *l.* Sterling, in the Year 1745. the Reſpondent never received any Part of the Appellant's Effects, or any other Payment, but only repeated Promiſes of Satisfaction by a Number of Letters from the Appellant.

22d July 1749. Firſt Interlocutor appealed from. The Lord Ordinary having conſidered the foregoing Debate, " his Lordſhip repelled the Reaſons of Suſpenſion and Reduction Aſſoilzied (or abſolved) from the Reduction; and found the Letters orderly proceeded and decerned; but ſuperſeded extracting of the Decreet until the 10th of *November* next to come."

Repreſentation for the Appellant. The Appellant preferred a Repreſentation to the Lord Ordinary, praying his Lordſhip to alter the ſaid Interlocutor, and to find, that the Reſpondent ought to produce the Account of his Intromiſſions and Diſburſements, or, at leaſt, to give in a Condeſcendence (or Particular) of the Cauſe of granting the Bond, confeſs or deny whether the Account drawn in the Preſence of his Agent, and Mr. *Francis Farquharſon*, was that from which he alleged the Balance aroſe, that was the Conſideration of the Bond; and whether he the Reſpondent received the Sums due to the Appellant, wherewith he is charged in ſaid Account, or to allow Colonel *Macdowgal*, and Captain *Wilkinſon*, to be examined upon the aforeſaid Facts, whereby the Neceſſity of the Condeſcendence might appear.

To

To this Repreſentation the Reſpondent gave in Anſwers; ſetting forth, That, there being no Foundation by the Law of *Scotland* for ſuſpending or reducing the Bond in Queſtion, upon the Grounds inſiſted on by the Appellant, the Reſpondent therefore could conſider the Suit in no other Light than as a deſigned Attack upon his Character: That the onerous Cauſe of the Bond in Queſtion was ſufficiently eſtabliſhed by the Vouchers ſtill extant, the Reſpondent had made up and exhibited an Account of very large Sums advanced by him to the Appellant, after his coming of Age to the time of granting the Bond; beſides other large Sums, of which the Vouchers had periſhed in the Courſe of ſo many Years, but were partly inſtructed by indiſputable Evidence: That the Fairneſs of this Tranſaction was now diſputed by the Appellant, without any Evidence, and only upon his own Aſſertion, which was contradicted by repeated Teſtimonies under his own Hand, for a Courſe of Twenty Years, teſtifying the Reſpondent's faithful Diſcharge of his Duty, as Guardian to the Appellant: That the Bond in Queſtion was granted by the Appellant, when 28 Years of Age, *major, ſciens, & prudens*, which, if it ſtood in need of any extrinſick Evidence, had been acknowleged by the Appellant for more than 20 Years, both by partial Payments, and by Promiſes of Satisfaction often made and repeated in Writing, and at ſuch a Diſtance of Time, when no Evidence was brought of any Fraud upon the Reſpondent's Part, he inſiſted, he could not now be compelled to prove, or even ſet forth, the onerous Cauſe of the Bond.

1749. Upon hearing this Repreſentation and Anſwer, "his Lordſhip adhered to his former Interlocutor of the 22d *July* "laſt; and refuſed the Deſire of the Repreſentation."

The Appellant preſented a Petition to the whole Lords, praying, that their Lordſhips would alter the Interlocutor of the Lord Ordinary above recited.

49-50. But their Lordſhips, after hearing and conſidering the ſame, did *unanimouſly*, without requiring any Anſwers from the Reſpondent, "*adhere* to the Lord Ordinary's Interlocutor, and *refuſed* the Deſire of the Petition."

Thereafter the Appellant gave in a Repreſentation to the Lord Ordinary, praying his Lordſhip would alter the ſaid Interlocutor; and, the Lord Ordinary having conſidered the ſaid Repreſentation, "he ordained the ſame to be ſeen and "anſwered, and, in the mean time, ſtopped extracting."

49-50. In Obedience to this laſt Interlocutor, Anſwers were put in for the Reſpondent; but, before any Judgment was given, the Appellant thought fit to bring his Appeal not only againſt the ſeveral Interlocutors of the 22d *July* and 9 *December* 1749. and 2d of *January* 1749-50. but alſo againſt that of the 12th *January* 1749-50. The Reſpondent humbly hopes, that the Three firſt Interlocutors Appealed from will be Affirmed, for the following, among other

REASONS:

I. For that here is not the leaſt Proof of Fraud, Circumvention, or unfair Dealing, on the Reſpondent's Part, either in obtaining the Bond in Queſtion, or in any other of the Tranſactions between him and the Appellant; nay, the very Tenor of the Bond proves his intire Affection to his Nephew; for, however willing he was to ſecure himſelf, he would not leave the Appellant to the Mercy of thoſe who might be his Succeſſors: Himſelf he could truſt, and therefore made the Money payable to him, or his Aſſigns: This Tenderneſs is inconſiſtent with an Intent unfairly to increaſe his own Eſtate at the Expence of his Nephew: If that had been intended, the Reſpondent would not have taken the Appellant out of the Power of his Heirs, as he muſt have been under much greater Difficulty to defend himſelf by any Surmiſe of Fraud, in obtaining this Bond after the Reſpondent's Death, than he could be while the Reſpondent continued alive.

The ſcrutinizing into every one of the Articles that make the Conſideration of a Deed, or other Security, at ſuch a great Diſtance of time as 23 Years, would be attended with infinite Inconvenience, and would open a Door to Perjury, and every other Kind of Fraud: When the Security is given, the Tranſaction is cloſed, the Vouchers of the ſeveral Items, after any conſiderable time, are laid by as uſeleſs, and loſt: Under ſuch Circumſtances, a Plaintiff, ſeeking to ſet aſide his own ſolemn Act, muſt make a very ſtrong Caſe to intitle himſelf to any Relief againſt it.

The Bond in Queſtion was entered into by the Appellant Eight Years after he came of Age, witneſſed by Two Gentlemen of undoubted Honour, one his own Brother, and the other an intimate Friend: The Debt has been not only acknowleged by Payments in Part, but by numberleſs Letters under the Appellant's Hand ever ſince the Execution of the Bond, profeſſing the higheſt Obligation to the Reſpondent, and the Juſtice of the Debt, which was never once queſtioned, until the Reſpondent, tired out with fruitleſs Promiſes of Payment, made a moſt reaſonable Requeſt of ſome further Security; then he is dragged, againſt his Will, into a Suit inſtituted by the Appellant his Nephew, litigating this Security, as obtained by groſs Fraud and Impoſition, and conſequently affecting the Reſpondent's Character in the higheſt Degree; but the Appellant's own Teſtimony of the Reſpondent's Fairneſs, Indulgence, and Kindneſs, leaves him concerned only for the Return he meets with.

For theſe, and other Reaſons, the Reſpondent humbly hopes, that the Three Firſt Interlocutors Appealed from ſhall be Affirmed; and the Appeal Diſmiſſed.

A. HUME-CAMPBELL.
AL. FORRESTER.

31°. March 1750.

Ord. & Adjudg'd that the ſaid Appeal be and is hereby Diſmiſſ'd this Houſe, and that the ſaid Interlocutors therein complain'd of be and the ſame are hereby Affirm'd.

A D E V A S O N:

Mr. Thomas Hay, of Mordington, - - } Respondent.
The Respondent's CASE.

The Respondent is not the lord of the land held of Trust, Circumvention, or [illegible] by the Act of Parliament 1579. and the Time limited by the Act 3 Years, would be expired with the Year of God 1760. if the Respondent had not been [illegible] by the Appellant's Procurement, and by Reasons of Absences [illegible] Appellant's Father, when no Process was brought or any Suit [illegible] the Respondent could not [illegible] Time, [illegible] Appellant's Father [illegible] Respondent [illegible] Appellant [illegible] Respondent [illegible] Appellant [illegible] Respondent [illegible] Appellant